

**CARGO PREFERENCE**  
**(formerly HB 15 Chapter 7)**

**7A. Introduction**

**1. Background**

a. Statutory requirements referred to as cargo preference apply to the ocean shipment of AID-financed commodities. In essence, cargo preference requires that at least 50 percent of the gross tonnage of all AID-financed commodities shipped on ocean vessels shall be shipped on U.S. flag commercial vessels if they are available at fair and reasonable rates for such vessels. The U.S. Maritime Administration (MARAD) holds delegated statutory authority to issue regulations as to how U.S. Departments and Agencies, such as AID, are to administer their cargo preference responsibilities. Extracts of applicable statutory provisions and of MARAD's regulations are contained in Appendix 7B.

b. AID's policies applicable to cargo preference administration are stated in Chapter 10, of AID Handbook 1, Supplement B - **Procurement Policies**. AID's regulatory provisions on cargo preference are set forth in Section 201.15 of AID Regulation 1, Appendix A of this Handbook. Host Country Contracting rules are summarized in Handbook 11, Chapter 3, Section 2.7.

**2. Applicability**

a. This chapter is applicable to the ocean transportation of all commodities financed by AID subject to the following exceptions:

(1) It is not applicable to Cash Transfer Agreements.

(2) It is not applicable to grants to American Schools and Hospitals Abroad, or to Public International Organizations, except in the instances where Handbook 1, Supplement B, Chapter 16 specifies that AID's procurement policies are applicable to these types of grants.

(3) It is not applicable to the ocean transportation between foreign countries of commodities purchased with foreign currencies, or the transfer of fresh fruits and products thereof, as provided in Section 603 of the Foreign Assistance Act (FAA).

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(4) It is not applicable to supplies donated by non-U.S. Government donors to the American Red Cross or to the Private and Voluntary Organizations (PVOs) registered with AID, nor to supplies purchased by such PVOs with non-U.S. Government funds even though the transportation of such donated or purchased supplies may be financed by AID pursuant to Section 123 of the FAA.

(5) It is not applicable to property provided on an advance-of-funds or reimbursement basis under a determination made in accordance with Section 607 (a) of the FAA.

b. This chapter does not apply to the transportation of commodities by aircraft. AID's policy with regard to air freight service is stated in Handbook 1, Supplement B, Chapter 7.

### 3. **Definitions**

Definitions of shipping terms applicable to this chapter are stated in Appendix 7A.

## 7B. **Responsibilities**

### 1. **Borrowers/Grantees**

Borrowers/Grantees (B/G's) shall be responsible for ensuring that AID-financed commodities are shipped aboard ocean vessels in accordance with cargo preference provisions which are incorporated into each AID financing agreement.

### 2. **USAID's**

USAID's are responsible for:

a. Advising cooperating governments as to the applicable provisions of this chapter;

b. Assisting cooperating governments in remedying noted deficiencies in compliance; and

c. Complying with the Cargo Preference Act in commodity purchases from USAID allotments.

### 3. **AID/W**

AID/W is responsible for compliance with the provisions of the Cargo Preference Act and for compliance with MARAD rules applicable to transactions governed by the Act.

a. The Office of Procurement (MS/OP) is responsible for:

(1) Assuring for AID that U.S. flag vessel participation in the movement of AID-financed commodities is in compliance with requirements of the Cargo Preference Act and with applicable MARAD rules;

(2) Reviewing individual country and borrower/grantee performance for compliance with the provisions of this Chapter;

(3) Preparing statements to Geographic Bureaus to advise them of deficient country or B/G performance and of possible corrective measures;

(4) Determining the indicated need for, and the amounts of, refunds to AID for inadequate compliance;

(5) Initiating requests for refunds for inadequate compliance. Such requests are subject to clearance with the appropriate Geographic Bureau, the Office of Financial Management (M/FM), and the General Counsel (GC);

(6) Making determinations of nonavailability of U.S. flag vessel service;

(7) Preparing reports as necessary or appropriate to the Administrator, the U.S. Maritime Administration, or to the Congress, as to AID's compliance with the provisions of the Cargo Preference Act and MARAD's rules applicable to Agency responsibilities under the Act;

(8) Maintaining statistics as to cargo preference performance for each cooperating country and loan and grant; and

(9) Assisting other AID/W offices and USAIDs in interpretation of the Cargo Preference Act as it is administered by AID.

b. Geographic Bureaus and Offices are responsible for:

(1) Transmitting policy, procedures, and performance statistics on this subject to B/G's and to USAIDs;

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(2) Incorporating the responsibilities of B/G's concerning cargo preference into all loan and grant agreements, either by reference to the provisions of AID Regulation 1 or the incorporation of the model clause in Appendix 7C. Any deviation from the language of Appendix 7C must be cleared with MS/OP; and

(3) Transmitting AID/W-approved formal refund requests initiated in accordance with Section 7F.

c. FM is responsible for extracting from documents received such data as may be required to record each country's or B/G's compliance with its cargo preference responsibilities. MS/OP will specify the data required.

d. The Office of Information Resources Management (MS/IRM) is responsible for processing data on cargo preference performance, as furnished by M/FM, into reports to MS/OP to accomplish its evaluation and reporting responsibilities detailed in this chapter.

#### 4. **Suppliers**

Suppliers are responsible for:

a. Making shipment on U.S. flag vessels to the extent required by the procurement authorization, unless relieved of this requirement in writing, under the provisions of Section 201.15(c) of AID Regulation 1 or of Section 2.7.2 of Chapter 3, Handbook 11 - **Country Contracting**.

b. Mailing a copy of each ocean bill of lading applicable to the transportation of AID-financed commodities to the Transportation Division, Office of Procurement, Agency for International Development, Washington, D.C. 20523-1419, and the Division of National Cargo, Maritime Administration, 400 Seventh Street, S.W., Washington, D.C. 20590-0001. (This requirement applies whether or not AID finances the freight.) Each bill of lading is to include all information specified in Section 201.52 of AID Regulation 1 or Section 3.10.3.3 of Chapter 3, AID Handbook 11.

c. Certifying to AID in either the form AID 282, "Supplier's Certificate and Agreement With AID," or the form AID 1450-4, "Supplier's Certificate and Agreement With AID For Project Commodities," that the bill of lading has been mailed to the Maritime Administration.

## 7C. Administration by AID

### 1. Requirements Imposed on Borrowers/Grantees

AID requires each B/G to make certain use of U.S. flag ocean vessels in the transportation of AID-financed commodities to enable AID to meet the cargo preference requirements imposed by statute and regulation. Assistance agreements must either be made subject to the provisions of AID Regulation 1 or incorporate a "Shipping" clause which implements the cargo preference requirement. Appendix 7C contains such a clause to be used in agreements not made subject to the provisions of AID Regulation 1.

### 2. **Geographic Areas**

AID is obligated to ensure that U.S. flag vessels are afforded fair and reasonable participation by geographic area in carrying AID-financed commodities. AID has, therefore, established two geographic areas and requires that B/G's afford participation to U.S. flag vessel operators in carrying AID-financed cargoes shipped from each of these areas, computed separately. The two geographic areas are (a) the United States (Code 000) and (b) the Free World (Code 899), other than the United States.

### 3. **Types of Vessels**

AID is also obligated to compute separately the usage of each of three types of ocean vessels, to the extent that they are appropriate for the cargo to be carried. These types of vessels are dry cargo liners, dry bulk carriers and tankers.

### 4. **Tonnage**

Shipments subject to cargo preference are recorded for compliance purposes by AID by metric tons. This is regardless of whether the vessel's charges are assessed on some other basis, such as long or short ton.

### 5. **Liner Revenue**

Regulations imposed on AID by MARAD require that AID ensure that at least 50 percent of the gross freight revenue paid to liners for the shipment of AID-financed commodities in liner parcels is paid to or for the benefit of U.S flag liner operators. Accordingly, AID incorporates this requirement in each agreement with a borrower/grantee. It should

be noted that a Non-Vessel Operating Common Carrier (NOCC) is not considered to be a U.S. flag liner operator by AID or MARAD, who will only credit for cargo preference purposes that portion of the tonnage and revenue which was actually carried on a U.S. flag vessel. Additionally, in accordance with Section 201.67 of AID Regulation 1, AID will not finance ocean freight for a cargo liner shipment at a rate which exceeds the lowest rate charged by the carrier for a similar shipment on the same voyage. Accordingly, when an NVOCC is used for shipment of AID financed cargo the supplier must provide a copy of the participating U.S. flag carrier's underlying bill of lading in addition to the bill of lading issued by the NVOCC.

## **6. Compliance by Borrowers/Grantees**

a. AID's agreements with B/G's impose differing methods as to how the B/G must achieve compliance with the use of U.S. flag vessels required by cargo preference. One method is established for AID-financed commodities shipped on liner parcels, normally on dry cargo liners; a second method is established for commodities shipped in full shipment load lots, which are normally carried on dry bulk carriers and on tankers.

b. The B/G's compliance for liner parcels must be achieved during the term of the agreement. Since MARAD is obliged by statute to report cargo preference compliance of all U.S. Government agencies to Congress annually, and does so on a calendar year basis, a calendar year compliance is, in effect, superimposed on AID's compliance requirement. Such annual compliance is achieved when the B/G ships during the calendar year at least 50 percent of the gross tonnage of liner shipments of commodities financed under the agreement on U.S. flag liner vessels and assures that at least 50 percent of the gross freight revenue generated during the calendar year by all liner shipments of commodities financed under the agreement is paid to or for the benefit of U.S. flag liner vessels. This compliance must be achieved from each of the two geographic areas in the event shipments are made from both. Compliance is determined by ship sailing dates, not booking or arrival dates.

c. The B/G's compliance for full shiploads of commodities must be achieved for each quantitative unit of cargo financed under the agreement. A quantitative unit of cargo is the total tonnage of a commodity or commodities included in one Invitation for Bids or other solicitation of offers from ocean carriers for the transportation of cargo which may move in shipload lots. Ocean vessels for this quantity

of cargo are chartered by the shipper. Chapter 4, Section 4E1b(3) of Handbook 1, Supplement B establishes that commodities are ineligible for AID financing if shipped under an ocean charter that has not received prior approval by AID/W. This policy is implemented in AID Regulation 1 and incorporated in agreements which are not subject to Regulation 1. Accordingly, B/G's or their agents must refer all proposed charters to MS/OP for prior approval. This affords MS/OP the opportunity and authority to withhold approval of any proposed charter of a non-U.S. flag vessel for the quantitative unit of cargo until MS/OP has determined that at least 50 percent of the quantitative unit will be moved on U.S. flag vessels. Although full shiploads are normally carried in bulk on dry bulk carriers and tankers, U.S. flag liners whose offers are responsive to the terms of the invitation for bids or other solicitation of vessels may be used for achieving compliance.

## 7. Availability of U.S. Flag Vessels

### a. General

(1) The Cargo Preference Act requires participation by U.S. flag vessels "to the extent such vessels are available," and this qualification is included in AID's agreements with B/G's. MS/OP's Transportation Division may make determinations, when circumstances warrant, that U.S. flag commercial vessels are not available. Authority to make such determinations is not delegated to B/G's. These determinations of nonavailability may be made for individual shipments of liner parcels or full shiploads, or for all liner shipments for a period of time from certain ports or a range of ports in a geographic area to the destination country.

(2) Nonavailability is not determined by comparison of freight costs between U.S. and foreign flag vessels. The Cargo Preference Act requires use of U.S. flag vessels available at **fair and reasonable rates for U.S. flag vessels**. Where direct or total U.S. flag service is available from port of origin to port of destination, neither AID nor MARAD will consider U.S. flag service utilizing a through bill of lading with a foreign flag feeder vessel as being in compliance with the Cargo Preference Act. A determination of nonavailability may be made in the following circumstances:

(a) When U.S. flag liner vessels do not offer service from the shipment's geographic source to the destination country;

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(b) When U.S. flag liner service for commodities which cannot be containerized is only available by transshipment, and a foreign flag liner carrier provides the required service without transshipment;

(c) When U.S. flag vessels are not available when the cargo is ready and available for shipment and it has been established that delaying the shipment until a U.S. flag vessel will be available would subject either the supplier or cargo to additional costs or the importer to significant delay in receipt of the cargo;

(d) When U.S. flag vessels which are otherwise available are found unsuitable for loading, carriage, or unloading methods required or for the port handling facilities available;

(e) When U.S. flag liner service is not available between the particular ports of loading/discharge stipulated in the delivery terms of the contract, provided that such ports are stipulated in a manner consistent with normal trade practices;

(f) When rates for otherwise available U.S. flag vessels are determined to be higher than fair and reasonable rates for such vessels;

(3) Determinations of nonavailability may be initiated by AID/W (MS/OP/TRANS), or requested of MS/OP/TRANS by a cooperating country or B/G, a supplier, or such other individual or agency as may be concerned with the shipment of AID-financed commodities.

**b. Liner Parcels**

(1) When a determination of liner nonavailability is requested of AID, it will be made or confirmed in writing prior to booking the cargo. The request will be substantiated so far as feasible by letter refusals to the supplier or AID from the U.S. liner operators normally serving the trade route.

(2) When AID/W determines that U.S. flag liner service is not available, the tonnage and freight revenue of a shipment subject to this determination is deleted from the B/G's required use of U.S. flag shipping.



**c. Full Shipload (Quantitative Units)**

(1) Availability of U.S. flag ocean vessels to carry full shiploads of commodities is determined on a case-by-case basis as their services are required and by reviewing vessels offered in response to a freight tender for a quantitative unit of cargo.

(2) AID/W determines the availability of such U.S. flag ocean vessels to carry full shiploads of commodities when a B/G submits information on the vessels offered for chartering for a quantitative unit of cargo for AID's approval. When AID determines that sufficient U.S. flag vessels are not available to carry 50 percent of the cargo for which freight offers were solicited, this determination will relieve the B/G of the cargo preference requirement for a proportionate amount of cargo. For example, if eligible, suitable U.S. flag vessels offer to carry only 20,000 tons of a total of 50,000 tons of fertilizer, AID's determination that U.S. flag shipping was not available for 5,000 tons would offset 5,000 tons of the foreign flag vessels used. Although in this example 20,000 tons would be carried by U.S. flags and 30,000 tons by foreign flags, the borrower/grantee would have achieved cargo preference compliance. Fifty percent of the cargo would be carried on U.S. flag vessels, to the extent U.S. flag vessels were available.

**8. Statistics**

MS/OP monitors the compliance of B/G's in meeting the required use of U.S. flag vessels by data obtained from the copies of the ocean bill of lading which the commodity supplier must submit to AID.

**7D. Implementation by Borrower/Grantees**

**1. Methods of Control**

The B/G shall establish controls or procedures to assure that sufficient use is made of U.S. liner service. Such controls are not necessary for the chartered use of vessels, as MS/OP enforces compliance by means of its charter approval authority, as described in paragraph 7C6c above. Some methods which may be applied to liner shipments are as follows:

a. Applicants for import licenses may be required to state the proposed source, tonnage, and freight charges. The license approval authority would stipulate that U.S. flag service must be used to the extent necessary. The importer then directs use of the authorized service in its credit to the supplier.

b. When procurement is undertaken for the public sector of the host country, the purchaser could apportion its shipments to achieve compliance. It could also authorize purchases from a particular geographic source only on an FAS port of export basis and use a sole shipping agency to arrange shipping in compliance with cargo preference requirements.

## **2. Analysis of Procurement Documents**

Procurement authorizations, tenders, requests for proposals, and invitations for bids for public sector procurement which will result in the ocean shipment of commodities should be analyzed by the B/G prior to issuance to determine which commodities or what portion of the commodities must be shipped aboard U.S. flag vessels to insure cargo preference compliance. Procurement authorizations or tenders for commodities may stipulate to the supplier that use of U.S. flag vessels is required for all or some portion of the commodities to be furnished. Contracts may specify what portion of the commodities to be acquired under the terms of the contract must be shipped aboard U.S. flag vessels, to achieve compliance with cargo preference.

## **3. Liner Revenue Requirement**

Compliance with the liner parcel revenue requirement requires greater control than that needed to assure that at least 50 percent of the gross liner parcel tonnage of AID-financed commodities is carried on U.S. flag liners. It is necessary to estimate the freight revenue which U.S. flag liners (not NVOCC's) will receive, particularly in those instances where the B/G may intend or desire to make only the minimum essential use of U.S. flag liners. The B/G may not properly assume that shipping 50 percent of the liner tonnage of a commodity program on U.S. flag liners will result in the U.S. flag liners receiving 50 percent of the total liner revenue from the program. There is too great a variance in liner revenue per ton, depending on the commodities involved. Many of the individual commodity rates are assessed by either weight or measurement (per so many cubic feet or cubic meters), depending on which will yield the greater revenue to the liner. This principle and its affect on achieving cargo preference compliance may be illustrated by the following example. The example incorporates only some of the various factors which may affect compliance:

**Example.** A B/G with a 100 ton commodity program from one geographic source to move by liner could comply as to tonnage if it had 50 percent of the commodity "A" shipped U.S. flag and 50 tons of commodity "B" shipped foreign flag. However, it must be certain that the freight

revenue to the U.S. flag liner (not NVOCC) from the 50 tons of commodity "A" equals or exceeds that from the 50 tons of commodity "B". In a great many instances, this cannot even be assured by determining that the rate per ton for commodity "A" equals or exceeds the rate per ton of commodity "B". Many rates are published as applying "per ton or 40 cubic feet, whichever yields the carrier greater revenue." If commodity "A" and "B" have the same or approximately equal rates per ton and commodity "A" is dense so that a ton occupies only 30 cubic feet, but commodity "B" is less dense so that a ton occupies 80 cubic feet, the carrier of commodity "B" would receive about twice the revenue the carrier of commodity "A" would receive.

## **7E. Compliance and Noncompliance**

### **1. Determination of Nonavailability**

AID's issuance of a determination of nonavailability of U.S. flag shipping relieves the borrower/grantee from the requirements of cargo preference for the tonnage covered by the determination of nonavailability. AID's analysis of each B/G's compliance with cargo preference requirements as incorporated into each agreement is made by MS/OP.

### **2. Prevention of Noncompliance**

MS/OP's review and approval functions with regard to shipping used for a quantitative unit of commodities (see 7C6c) assures that the B/G will achieve compliance for the tonnage of each quantitative unit, unless the B/G fails to seek AID's approval prior to shipment. Such a failure would make both the commodities and freight ineligible for AID financing, and cargo preference would no longer apply. MS/OP's analysis of the extent of each B/G's use of U.S. flag liner service during the period of the agreement may reveal that it is probable that compliance will not be achieved by the terminal date of the agreement. In such instances, MS/OP may initiate corrective action to require that all subsequent shipments be made on U.S. flag liners until compliance is assured as provided in Chapter 10A7a of Handbook 1, Supp. B. Authority for this is contained in AID Regulation 1 and comparable provisions are included in agreements not subject to the provisions of AID Regulation 1.

### **3. Remedies for Noncompliance**

AID does not extend any assurance to a cooperating country or B/G that AID will afford any relief from the normally prescribed refund action in the event of deficient or inadequate compliance with cargo preference requirements. In exceptional circumstances, and when AID finds that such action will not result in AID's violating the provisions of the Cargo Preference Act, AID may:

a. Offset a shortfall in a particular loan or grant with the actual or prospective greater-than-minimum-essential performance in another loan or grant to the same country. The loan or grant or its implementing document would require amendment to reflect AID's agreement and to stipulate performance required by the B/G to achieve compliance; or

b. Offset a deficit in performance by one B/G country during a particular period by an overage in performance by another B/G country.

#### **7F. Refunds**

1. Refund requests for noncompliance with cargo preference are based on the rights of AID against B/G's as expressed in 201.81 of AID Regulation 1 (Appendix A). Similar provisions are incorporated in loans and grants not subject to AID Regulation 1.

2. MS/OP will report a B/G's noncompliance with cargo preference to DAA/MS. This will occur whenever the cargo preference statistics of a loan or grant, after deducting tonnage covered by determinations of nonavailability, establish that the B/G has failed to accomplish the cargo preference requirements imposed by the loan or grant. The report will include recommendations as to whether it is considered feasible to afford the B/G any relief from the requirement, in accordance with the alternatives stated in paragraph 7E3. The report will also include a statement as to the appropriate refund which AID may claim of the B/G.

3. DAA/MS, in consultation with the appropriate Geographic Bureau and Office of the General Counsel (GC), will determine whether or not to:

a. Recommend to the Administrator that refund action be taken, or

b. Approve remedying the shortfall in compliance by the use of one or the other of the alternatives provided in paragraph 7E3 above.

APPENDIX 7A  
CARGO PREFERENCE  
DEFINITIONS

The following definitions apply to shipping terms applied to Chapter 7.

Cargo Preference means the required use of U.S. flag ocean vessels established by the Cargo Preference Act of 1954, Section 901(b)(1) of the Merchant Marine Act of 1936 as amended, 46 U.S.C. 1241(b)(1) and the required use of U.S. flag ocean vessels which AID imposes on a borrower/grantee to enable AID to meet its statutory regulations of the U.S. Maritime Administration

Contract of Affreightment. An obligation undertaken by the carrier/owner to carry goods by sea/air or to charter a ship or aircraft for a rate of freight agreed upon in advance. This contract of affreightment as it is so called may subsequently be substituted in a charter party, bill of lading or booking note.

Charter Party. A single document incorporating the terms of the contract between the carrier and shipper for the hire of a ship or aircraft, or a portion thereof, for one or more voyages or flights, or for a period of time. Its clauses contains notes, terms and conditions of carriage and include provisions established by international agreements and, by reference, provisions of law. The charter party usually overrides any provisions of the carrier's bill of lading, although the charter party may provide that the bill of lading will serve as a receipt for the cargo.

Booking Note or Booking Agreement. A contract of affreightment which incorporates all or some of the provisions of the carrier's bill of lading by reference. The note or agreement adds provisions which stipulate the rights and responsibilities of the parties as to such things as the loading and discharging of cargo, despatch and demurrage, rates, brokerage fees, etc. Booking notes/agreements may be used for parcels of cargo, but may not be used in lieu of a charter party for the hire of a ship or portion thereof.

Dry Bulk Carrier. Any nonscheduled single-decked vessel designed to carry bulk commodities, other than a tanker, which offers to carry a full bulk cargo. Rates are negotiated for the particular voyage, and rates and services are fixed by a charter for the movement of a specific quantity of a commodity, at a specified time from a particular port or ports to one or more destination ports.

Dry Cargo Liner. Any type of vessel other than a dry bulk carrier or tanker operated in scheduled service between two or more countries over specified trade routes. Charges for liner service are fixed in tariffs published by the vessel operator with the Federal Maritime Commission (FMC) and are normally

available uniformly to any shipper. Virtually any commodity may be shipped in liner service, including commodities which are not "dry cargo" such as petroleum, vegetable oils, and other bulk liquids which the liner carries in containers or deep tanks built into the vessel.

#### Fair and reasonable rates

a. The Cargo Preference Act's required use of U.S. flag vessels stipulates that their usage is dependent on the extent such vessels are available at "fair and reasonable rates for U.S. flag commercial vessels." AID's general practice is to accept that liner tariff rates filed with the Federal Maritime Commission for transportation service to and from the United States are fair and reasonable.

b. Conferences of liner operators, and also individual (nonconference) liner operators, designate in their tariffs that the freight rates for certain commodities are "open"; no fixed rate or charge is set forth in the tariff. The commodities in such instances are usually those that move in substantial quantities or "parcels", such as fertilizers, cement, etc. The liner operator will quote a rate to a prospective shipper for a particular consignment. Such quoted rates will fluctuate from time to time, reflecting supply and demand for shipping space. AID reserves the right in such instances to determine whether the rate quoted for a particular shipment is fair and reasonable at the time and for the trade concerned.

c. Dry bulk carrier and tanker rates are negotiated between shippers and vessel operators and fixed by a charter. AID refers proposed rates for full shiploads of cargo in such cases to the U.S. Maritime Administration for review, and will determine that the rate is not fair and reasonable in instances where the U.S. Maritime Administration advises AID that the offered rate exceeds their guideline rate for the vessel and voyage concerned.

Flag of Registry. AID accepts Lloyd's Register and Lloyd's Shipping Index in effect as of the date of loading of the vessel as reference in determining the flag of registry of a particular vessel.

Liner Conference. An association of common carriers by water (liner operators) which is permitted by the Federal Maritime Commission to file a tariff for the services of all members of the conference. The members usually include both U.S. and foreign flag carriers, and with the exception of service contracts and independent action, tariff's rates and charges are uniform for all members. A conference tariff may contain "open rates" for particular commodities.

Open Rates. A liner conference tariff may state that the conference has agreed that the rates of its members for one or more specific commodities are "open". The conference tariff will not specify the applicable freight rate in such instances. The individual members of the conference may then establish their individual rates for these "open" commodities, and such individual carrier rates may vary between members of the conference. Each conference member is then required to file its individual tariff with the Federal Maritime Commission to cover the rates, charges, and rules applicable to carrying the open rated commodity of the conference tariff.

U.S. Flag Vessel. For cargo preference purposes, this term includes all U.S. flag registry vessels owned by commercial firms or individuals except those which, subsequent to September 21, 1961, shall have been built outside the United States, rebuilt outside the United States, or documented under any foreign registry until such vessels shall have been documented under the laws of the United States for a period of three years. The three year qualification provision does not apply to U.S. flag vessels built or reconstructed outside of the United States pursuant to Sec. 615 of the Merchant Marine Act of 1936.

Tariff. A publication containing the rates, charges, classification of commodities, rules, regulations, and practices of a common carrier (including Nonvessel Operating Common Carriers - NVOCC) for transportation by water.

Transshipment. Transshipment means the physical transfer of cargo from one vessel to another. Transfer of containerized cargo between vessels of one common carrier is a relay, and is not considered transshipment.

## APPENDIX 7B

### CARGO PREFERENCE STATUTORY AND REGULATORY PROVISIONS

#### I. Background

Various U.S. statutes since 1904 have incorporated the cargo preference principle. In general, the principle is that when the U.S. Government generates cargo by virtue of loans, grants, guarantees of payment, acceptance of foreign currency, or direct purchase, a portion of the cargo will be transported in privately owned U.S. flag ships. This principle is supportive of the basic maritime policy of the United States, as now stated in the Merchant Marine Act, 1936, which reads:

It is necessary for the national defense and development of its foreign and domestic commerce that the United States should have a merchant marine (a) sufficient to carry...a substantial portion of the waterborn...foreign commerce of the United States...(b) capable of serving as a naval and military auxiliary in time of war or national emergency..."

#### 2. The Cargo Preference Act

The Cargo Preference Act of 1954, P.L. 664 (83rd Congress), amended Section 901(b) of the Merchant Marine Act of 1936 to require that at least 50 percent of U.S. Government financed cargo be carried on U.S. flag shipping. This section of the Merchant Marine Act was further amended by P.L. 266 (87th Congress) to establish when certain U.S. flag vessels are not deemed to be "privately owned U.S. flag vessels" for the purposes of Section 901(b). As so amended the section states:

(b) Whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such equipment, materials, or commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers), which may be transported on ocean vessels, shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for



United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United

States-flag commercial vessels in such cargoes by geographic areas. Provided, that the provisions of this subsection may be waived whenever the Congress by concurrent resolution or otherwise or the President of the United States or the Secretary of Defense declares that an emergency exists justifying a temporary waiver of the provisions of Section 901(b) and so notifies the appropriate agency or agencies. And provided further, that the provisions of this subsection shall not apply to cargoes carried in the vessels of Panama Canal Company. Nothing herein shall repeal or otherwise modify the provisions of Public Resolution Number 17, (73rd Congress) (48 Stat. 500) as amended. For purposes of this section, the term "privately owned United States-flag commercial vessels" shall not be deemed to include any vessel which subsequent to the date of enactment of this amendment shall have been either (a) built outside the United States, (b) rebuilt outside the United States, or (c) documented under any foreign registry, until such vessel shall have been documented under the laws of the United States for a period of three years. <sup>1/</sup> Provided, however, that the provisions of this amendment shall not apply where, (1) prior to the enactment of this amendment, the owner of a vessel, or contractor for the purchase of a vessel, originally constructed in the United States and rebuilt abroad or contracted to be built abroad, has notified the Maritime Administration in writing of its intent to document such vessel under United States registry, and such vessel is so documented on its first arrival at a United States port not later than one year subsequent to the date of the enactment of this amendment, or (2) where prior to the enactment of this amendment the owner of a vessel under United States registry has made a contract for the rebuilding abroad of such vessel and has notified the Maritime Administration of such contract, and such rebuilding is completed and such vessel is thereafter documented under United States registry on its first arrival at a United States port not later than one year subsequent to the date of the enactment of this amendment."

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<sup>1/</sup> Subsequent legislation has modified this three year qualification provision to permit certain U.S. flag vessels that were built or reconstructed overseas to obtain immediate qualification to carry preference cargo.

### 3. MARAD Authority

a. Section 27, P.L. 469 (91st Congress), the Merchant Marine Act of 1970, gave new authority on cargo preference administration to the Secretary of Commerce. This authority delegated to the U.S. Maritime Administration (MARAD) was transferred from the Department of Commerce to the Department of Transportation when the MARAD was transferred to the latter Department. Section 27 further amended Section 901 of the Merchant Marine Act of 1936 by adding a new subsection (b)(2) which now reads:

"b(2) Every department or agency having responsibility under this subsection shall administer its programs with respect to this subsection under regulations issued by the Secretary of Transportation. The Secretary of Transportation shall review such administration and shall annually report to the Congress with respect thereto."

b. The Conference report accompanying the Merchant Marine Act of 1970 (No. 91-155), in explaining the reason for the above amendment, said:

"There is a clear need for a centralized control over the administration of preference cargoes. In the absence of such control, the various agencies charged with administration of cargo preference laws have adopted varying practices and policies, many of which are not American shipping oriented. Since these laws were designed by Congress to benefit American shipping, they should be administered to provide maximum benefits to the American merchant marine. Localizing responsibility in the Secretary of Transportation to issue standards to administer these cargo preference laws gives the best assurance that the objective of these laws will be realized."

### 4. MARAD Regulations

The MARAD has added Part 381 to Title 46, Chapter II, Code of Federal Regulations to implement its above authority, and has issued seven regulations under the Part 381. Quotations follow from four of these regulations:

a. Section 38l.3 reads:

38l.3 Reporting information and procedure.

(a) Reports of cargo preference shipments. Each department or agency subject to the Cargo Preference Act of 1954, except the Department of Defense for which separate regulations will be issued, shall furnish to the Maritime Administration, Cargo Preference Control Center, Transportation Building, Washington, D.C. 20590, within 20 working days of the date of loading for shipments originating in the United States or within 30 working days for shipments originating outside the United States, the following information concerning each shipment of preference cargo:

(1) Identification of the sponsoring U.S. Government agency or department

(2) Name of vessel

(3) Vessel flag of registry

(4) Date of Loading

(5) Port of Loading

(6) Port of final discharge

(7) Commodity description

(8) Gross weight in pounds

(9) Total ocean freight revenue in U.S. dollars

(b) Format of Reports. The information listed in paragraph (a) of this section shall be furnished to the Maritime Administration in a format prepared by the reporting department or agency and approved by the Assistant Secretary of Transportation for Maritime Affairs as suitable for the purpose of carrying out his responsibility under Section 90l(b)(2) of the Merchant Marine Act, 1936, as amended, pursuant to the authority delegated to him thereunder by the Secretary of Transportation, under Section 3 of Department Organization Order 10-8, 36 F.R. 1223. Where obtainable, a properly notated and legible copy of the ocean bill of lading in English will suffice. Reporting formats shall be submitted for approval by April 30, 1971.

(c) Shipments made subject to the Act. In those instances where a shipment has been made that was not known to be subject to the Cargo Preference Act of 1954 when it was made, but subsequent events cause it to be subject to that Act, the agency taking the action that caused the shipment to be subject to the Act shall furnish to the Maritime Administration, Cargo Preference Control Center, the information listed in paragraph (a) of this section in the approved reporting form.

Effective date. These regulations shall become effective for all cargo preference shipments loaded on or after July 1, 1971."

b. Section 381.4 reads:

"381.4 Fair and reasonable participation. In order to insure a fair and reasonable participation by U.S.-flag commercial vessels in liner parcel cargoes subject to the Cargo Preference Act of 1954, as required by that Act, the head of each department or agency having responsibility under that Act shall prescribe regulations on formal staff instructions providing for the cargo mix of liner parcel cargoes transported on ocean vessels to be divided between privately owned U.S.-flag vessels and foreign-flag vessels in such a manner as to yield to the U.S.-flag vessels freight revenue per long ton at least equal to the freight revenue per long ton afforded the foreign-flag vessels participating in the same grant, loan or purchase transactions. A copy of the regulations or staff instructions prescribed by each department or agency shall be furnished to the Secretary, Maritime Administration, no later than June 30, 1971."

c. Section 381.5 reads:

"381.5 Fix American-flag tonnage first. Each department or agency having responsibility under the Cargo Preference Act of 1954 shall cause each full shipload of cargo subject to said Act to be fixed on U.S.-flag vessels prior to any fixture on foreign-flag vessels for at least that portion of all preference cargoes required by that Act to be shipped on U.S.-flag vessels, computed by purchase authorization or other quantitative unit satisfactory to the agency involved and the Maritime Administration, except where such department or agency determines, with the concurrence of the Maritime Administration, and (a) U.S.-flag vessels are not available at fair and reasonable rates for U.S.-flag commercial vessels, or (b) that there is a substantially valid reason for fixing foreign-flag vessels first."

d. Section 38l.7 reads:

"38l.7 Federal Grant, Guaranty, Loan and Advance of Funds Agreements. In order to insure a fair and reasonable participation by privately owned United States-flag commercial vessels in transporting cargoes which are subject to the Cargo Preference Act of 1954 and which are generated by U.S. Government Grant, Guaranty, Loan and/or Advance of Funds Programs, the head of each affected department or agency shall require appropriate clauses to be inserted in those Grant, Guaranty, Loan and/or Advance of Funds Agreements and all third party contracts executed between the borrower/grantee and other parties where the possibility exists for ocean transportation of items procured, contracted for or otherwise obtained by or on behalf of the grantee, borrower, or any of their contractors or subcontractors. The clauses required by this Part shall provide that at least 50 percent of the freight revenue and tonnage of cargo generated by the U.S. Government Grant, Guaranty, Loan or Advance of Funds be transported on privately owned United States-flag commercial vessels. These clauses shall also require that all parties provide to the Maritime Administration the necessary shipment information as set forth in 38l.3. A copy of the appropriate clauses required by this Part shall be submitted by each affected agency or department to the Secretary, Maritime Administration, for approval no later than 30 days after the effective date of this Part. The following are suggested acceptable clauses with respect to the use of United States-flag vessels to be incorporated in the Grant, Guaranty, Loan and/or Advance of Funds Agreements as well as contracts and subcontracts resulting therefrom:

(a) Agreement Clauses. "Use of United States-flag vessels:

(l) "Pursuant to Pub. L. 664 (46 U.S.C. 124l(b) at least 50 percent of any equipment, materials or commodities procured, contracted for or otherwise obtained with funds granted, guaranteed, loaned, or advanced by the U.S. Government under this agreement, and which may be transported by ocean vessel, shall be transported on privately owned United States-flag commercial vessels, if available.

(2) Within 20 days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, "on-board" commercial ocean bill-of-lading in English for each shipment of cargo described in paragraph (l) above shall be furnished to both the Contracting Officer

(through the prime contractor in the case of subcontractor bills-of-lading) and to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, D.C. 20230."

(b) Contractor and Subcontractor Clauses. "Use of United States-flag vessels: The contractor agrees:

(1) "To utilize privately owned United States-flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to this contract, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels.

(2) To furnish within 20 days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated "on-board" commercial ocean bill-of-lading in English for each shipment of cargo described in paragraph (1) above to both the Contracting Officer (through the prime contractor in the case of subcontractor bills-of-lading) and to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, D.C. 20230.

(3) To insert the substance of the provisions of this clause in all subcontracts issued pursuant to this contract."

## 5. Statutory Provisions of the Foreign Assistance Act

The Foreign Assistance Act of 1961, as amended, exempts certain limited transactions from the provisions of the Cargo Preference Act.

a. Section 603 of the FAA applies to the use of certain foreign currency funds, and the transfer of fresh fruits and products thereof, and is quoted for convenience."

"Sec. 603. Shipping on United States Vessels. The ocean transportation between foreign countries of commodities and defense articles purchased with foreign currencies made available or derived from funds made available under this Act or the Agricultural Trade Development and Assistance Act of 1954, as amended (7 U.S.C. 1691 et seq.), and transfers of fresh fruit and products thereof under this Act, shall not be governed by the provisions of section 901(b) of the Merchant Marine Act of 1936, as amended (46 U.S.C. 1241), or any other law relating to the ocean transportation of commodities on United States flag vessels."

b. The Cargo Preference Act includes the statement: "Nothing herein shall repeal or otherwise modify the provisions of Public Resolution 17, Seventy-third Congress (48 Stat. 500) as amended." PR 17 (15 U.S.C. 616a) reads as follows:

"Sec 616a. Shipment of exports financed by Government in United States Vessels. It is the sense of Congress that in any loans made by the Reconstruction Finance Corporation or any other instrumentality of the Government to foster the exporting of agricultural or other products, provision shall be made that such products shall be carried exclusively in vessels of the United States, unless, as to any or all of such products, the United States Maritime Commission, after investigation, shall certify to the Reconstruction Finance Corporation or any other instrumentality of the Government that vessels of the United States are not available in sufficient numbers, or in sufficient tonnage capacity, or on necessary sailing schedule, or at reasonable rates."

However, Executive Order 11223 of May 12, 1965, exempted the Administration of the Foreign Assistance Act of 1961, as amended, from the provisions of P.R. 17.

c. Subsection 491(b) of the FAA applies to funds related to the International Disaster Assistance Program (IDA):

"Subject to the limitations in section 492, and notwithstanding any other provision of this or any other Act, the President is authorized to furnish assistance to any foreign country, international organization, or private voluntary organization, on such terms and conditions as he may determine, for international disaster relief and rehabilitation, including assistance relating to disaster preparedness, and to the prediction of, and contingency planning for, natural disasters abroad." (Emphasis added.)

The subsection and its legislative history establish the principle that IDA shipments are exempt from otherwise applicable procurement laws including The Cargo Preference Act.

## 6. AID Regulations

AID's regulatory implementation of cargo preference is contained in Sections 201.15 and 201.31(f) of AID Regulation I, Appendix A of this Handbook and in Handbook II, Chapter 3. Further regulatory implementation applicable to AID direct contracts is contained in Handbook I4.



APPENDIX 7C  
CARGO PREFERENCE  
MODEL AGREEMENT CLAUSE

The following clause shall be used to incorporate cargo preference requirements into loan and grant agreements, when such agreements do not incorporate the provisions of Section 201.15 of AID Regulation 1. Any proposed deviation from the model clause shall be cleared by MS/OP prior to use in an agreement.

Section \_\_\_\_\_. U.S. flag vessel shipping requirement.

- (a) General requirements. Unless AID determines that privately owned U.S. flag commercial ocean vessels are not available at fair and reasonable rates for such vessels,
  - (1) at least fifty percent (50%) of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers from each of two geographic areas - the United States and all other countries) of all goods financed by AID which are transported on ocean vessels shall be transported on privately owned U.S. flag commercial vessels and
  - (2) at least fifty percent (50%) of the gross freight revenue generated by all shipments of AID-financed commodities which are transported to the territory of the borrower/grantee on dry cargo liners shall be paid to or for the benefit of privately owned U.S. flag commercial vessels.
- (b) Methods of compliance
  - (1) Compliance with these requirements with respect to liner parcels shall be achieved for the total of liner shipments made during the term of the loan or grant agreement. If AID determines at any time during the term of the agreement that compliance may not be achieved, AID may require that all subsequent shipments be made on U.S. flag liners until compliance is assured.
  - (2) Compliance with these requirements for full shiploads of commodities shall be achieved for each quantitative unit of cargo. A quantitative unit of cargo is the total tonnage of a commodity or commodities included in one invitation for bids or other solicitation of offers from ocean carriers for the transportation of cargo which may move in full shipload lots. AID shall approve a charter or other contract of affreightment for a non-U.S. flag vessel only if AID has

determined that at least 50% of the quantitative unit will move on U.S. flag vessels, to the extent that such vessels are available at fair and reasonable rates for such vessels. Although full shiploads are normally carried in bulk on dry bulk carriers and tankers, U.S. flag dry cargo liners whose offers are responsive to the terms of the invitation for bids or other solicitation of vessels may be used for achieving compliance for the quantitative unit.

(c) Nonavailability of U.S. flag vessels

Upon application of the borrower/grantee or the supplier, AID/W, Office of Procurement, shall determine and advise the applicant whether or not privately owned U.S. flag vessels are available for any specific shipment of commodities at fair and reasonable rates. A determination that U.S. flag vessels are not available does not carry with it the authorization for AID to finance freight on a vessel not otherwise authorized.

(d) Responsibility

The borrower/grantee is responsible for compliance with the requirements of this section and for imposing upon subborrowers, contractors, and importers such requirements regarding shipping arrangements with suppliers as will assure discharge of this responsibility.

(e) Privately owned U.S. flag commercial vessels

For purposes of this section the term "privately owned U.S. flag commercial vessels" shall not include any vessel which, subsequent to September 21, 1961, shall have been either built outside the United States, rebuilt outside the United States, or documented under any foreign registry until such vessel shall have been documented under the laws of the United States for a period of three years, unless such vessels are otherwise qualified through provisions of subsequent legislation.

(f) Reporting Requirements

The supplier is responsible for mailing a copy of each bill of lading applicable to the transportation of AID-financed commodities to the Transportation Division, Office of Procurement, Agency for International Development, Washington, D.C. 20523-1419 and to the Division of National Cargo, Maritime Administration, Washington, D.C. 20590-0001, and to certify to AID in either form AID 282 or form AID I450-4 that the bill of lading has been so mailed to the Maritime Administration.